



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 1107 OF 2013

GEORGE BONIFACE MBUGUA ALIAS

GEORGE BONIFACE NYANJA.....PLAINTIFF

VERSUS

MOHAMMED JAWAYD IQBAL (Sued as the Personal Representative of the

Estate of the Late Ghulam Rasool Janmohamed).....DEFENDANT

JUDGEMENT

1. The Plaintiff seeks an order that the Defendant transfers to him L.R. No. 1/387, Ngong Road Nairobi in his Amended Plaint dated 14/8/2014. He entered into a sale agreement in 1985 with the late Ghulam Rasool through which he bought Mr. Rasool's parcel of land known as L.R. No. 1/387 situated along Ngong Road ("the Suit Property"). He claims that he paid the late Ghulam Rasool and his agents the sum of Kshs. 2,016,295 and took possession of the property as a purchaser for value.
2. The Plaintiff filed on 14/5/1989. He amended the plaint and added the personal representative of the Estate of Ghulam Rasool Janmohamed, Shariff Chaudry who was first appointed administrator of the Estate of Ghulam Rasool Janmohamed died before the dispute was determined. The Plaintiff claims that the Defendant has failed to transfer the Suit Property to the Plaintiff yet he is aware that the Plaintiff paid the full purchase price.
3. The Defendant denies the Plaintiff's claim and refers to the sale agreement. He denies that the Plaintiff paid the full purchase price or that he took possession upon paying the full purchase price. The Defendant argues that the completion documents for the Suit Property were sent to the Plaintiff's advocates following the extension of the completion date in September, 1985.
4. The Defendant maintains that only the sum of Kshs. 1,516,295/= was paid leaving a balance of Kshs. 483,705/=. The Defendant argues that the Plaintiff's refusal to pay the balance of the purchase price amounts to repudiation and cancellation of the sale agreement and that the refusal is tantamount to rescission on the part of the Plaintiff.
5. In the Amended Counterclaim filed alongside the Amended Defence on 19/6/2014, the Defendant seeks rent from the Plaintiff in the sum Kshs. 25,020,000/= calculated from 1986 until 2011 and claims rent thereafter until judgement is entered. The Defendant also seeks interest on the rent at court rates together with costs of the Counterclaim.
6. The Plaintiff testified in court. He entered into a sale agreement with the late Ghulam Rasool in 1985 for the purchase of the Suit Property at Kshs. 2 million. At the time of entering into the agreement, he had already paid the Mr. Rasool Kshs. 200,000/= and was to pay the balance by 31/10/1985. He maintains that he paid Kshs. 500,000/= to Mr. Rasool in November, 1985 and Kshs. 516,295/= on 8/1/1986 out of the funds held in the fixed deposit account by Nationwide Finance Company Limited. He claims he occupied the suit Premises on 4/1/1986 after agreeing with Mr. Rasool that he would complete paying the purchase price.
7. The agreement stated that the purchase price was Kshs. 2 million out of which 200,000/= had been paid to the vendor. Kshs. 300,000/= was to be paid to the vendor's advocate Mr. Khan to hold as stakeholder pending completion. The balance of Kshs. 1.5 million was to be paid on the completion date which was stated to be on or before 31/10/1985. On the date of completion, the vendors' advocate was to deliver to the purchaser's advocate a duly executed transfer of the property, a valid rates clearance certificate, a duly completed and signed form for valuation of stamp duty together with all documents of title relating to the Suit Property in the vendor's possession. Time was to be of essence under the agreement. Clause 9 of the other conditions stipulated that if payment was delayed beyond the date then interest would be charged at 16% per annum on the balance outstanding. The agreement was not signed.
8. Mr. Ghulam Rasool died on 19/3/1986 and the late Shariff Chaudry was appointed administrator of his estate. Mr. Shariff Chaudry demanded that the Plaintiff complete paying the purchase price following which he paid Kshs. 300,000/= on 8/7/1987, Kshs. 300,000/= on

10/9/1987 and the last installment of Kshs. 200,000/= on 24/11/1987.

9. He made payments through his advocates and the Defendant acknowledged receipt of the payments. He stated that he paid the total sum of Kshs. 2,016,295/= towards the purchase of the Suit Property.

10. The Plaintiff also produced a copy of the Defendant's lawyer's letter dated 20/11/1985 reminding the Plaintiff's advocates to give their undertaking. The letter forwarded documents to enable the Plaintiff's advocates complete the registration in favour of their client and sought a professional undertaking not to make use of the documents until the balance of the purchase price was paid.

11. The letter dated 20/11/1985 addressed to Nationwide Finance Company Limited asked this corporation to pay the sum of Kshs. 500,000/= it held in the fixed deposit to Mr. Ghulam Rasool together with interest for 3 months. In the letter dated 3/1/1986 the Plaintiff's lawyers confirmed that he was making efforts to release the balance of the purchase price. His advocates wrote to Mr. Khan on 21/2/1986 stating that the Plaintiff had been granted a loan of Kshs. 600,000/= by the Housing Finance Company of Kenya for part payment for the purchase of the Suit Property. The letter stated that the Plaintiff promised to deposit the remaining balance Kshs. 200,000/= with his advocate shortly and went on to state that the previous tenant of the premises was paying rent of Kshs. 8,000/= per month and that it was the Plaintiff's intention to complete the transaction urgently and not to be paying rent.

12. The Plaintiff denied ever agreeing with the late Rasool or his administrator, the late Shariff Chaudry, to pay rent for his continued occupation of the Suit Property. He maintains that the late Ghulam Rasool recognised his ownership of the Suit Property by issuing the transfer documents to him through his advocate after he made substantial payment of the purchase price. According to him, the sale agreement was not rescinded as the late Ghulam Rasool accepted his instalments towards the purchase price after the completion date. Similarly, his administrator the late Shariff Chaudry accepted the payments he made towards the purchase price.

13. Mr. Khan's letter to the Plaintiff dated 28/7/1986 informed the Plaintiff that if the sale of the Suit Property was not completed within 30 days then the Plaintiff would be sued for specific performance. The letter demanded payment of Kshs. 1,200,000/= made up as follows: -

Balance of purchase price	Kshs. 1 000,000.00
Rent from January to August, 1986.....	Kshs. 120,000.00
Interest on balance from 1 st January 1986 to 31 st August 1986.....	Kshs. 80,000.00

14. The Plaintiff's advocates' letter of 5th August in response to Mr. Khan's letter stated that the balance of the purchase price was Kshs. 800,000/= since the Plaintiff had paid Kshs. 1.2 million before the death of Mr. Ghulam Rasool. The letter disputed that rent and interest on the outstanding sum were payable. The letter of 28/8/1986 from the Plaintiff's advocate to Mr. Khan stated that the Plaintiff had paid the purchase price through installments of Kshs. 200,000/=, 500,000/= and 500,000/=. The letter requested a meeting to agree on the issue of rent. The meeting took place as was confirmed by Mr. Khan's letter of 29/4/1987. The letter stated that the administrator of the estate of Mr. Ghulam Rasool had confirmed that they would leave out all rent payments if the matter was finalised within 2 months. The letter went further to state that if the transaction was completed within 2 months then his client would claim interest on the unpaid purchase at the rate of 16% p. a from 1st November, 1985.

15. The Plaintiff's advocates wrote to Mr. Khan on 8/7/1987 explaining that the delay in replying his letter of 29/4/1987 was caused by the writer's absence as he was out of the country. The letter sought to know if Nationwide Finance Company had confirmed payment of Kshs. 500,000/=. The letter forwarded a cheque for Kshs. 300,000/= being further payment.

16. Mr. Khan wrote to the Plaintiff's advocate on 13/7/1987 acknowledging receipt of the sum of Kshs. 300,000/= while stating that Nationwide Finance had confirmed payment of Kshs. 500,000/= to Mr. Rasool. The letter sought a statement of the payments made so that the matter could be finalised on how the balance would be paid. The Plaintiff's advocate wrote to Mr. Khan on 10th September forwarding payment of Kshs. 300,000/= as further payment while indicating that the statement would soon come.

17. The Plaintiff's advocate's letter of 24th November made reference to the letter of 10/9/1987 and stated that the purchaser had paid Kshs. 200,000/= as a first deposit and that he later paid a further Kshs. 500,000/=. The letter mentioned the Kshs. 500,000/= forwarded by Nationwide Finance and stated that the Plaintiff's advocates had forwarded Kshs. 600,000/=. The letter enclosed the balance of Kshs. 200,000/= and indicated that nothing was outstanding while seeking the name of the administrator who would sign the transfer.

18. The Plaintiff's advocate's letter dated 13th April which made reference to the letter of 14/3/1988 stated that the purchase price of Kshs. 2 million had been paid. The letter stated that the Plaintiff did not get into possession as a tenant but as a purchaser and that after paying most of the purchase price he was not to pay rent.

19. The Plaintiff produced a copy of a cheque for Kshs. 516,295/= banked in Mr. Ghulam Rasool's account on 9/1/1986 together with copies of rates demand notes dated 26/1/2007, 3/7/2007, 6/5/2008, 10/6/2010, 23/1/2012, 25/1/2013 and 22/1/2014. The amounts paid are shown at the bottom of the rates demand notes. The figures range from Kshs. 10,000/= to Kshs. 1,091,797.50/=:, with the latter payment having been made on 31/1/2007. The rates demand notes are addressed to Ghulam Rasool. The Plaintiff also produced copies of electricity bills dated 1/1/2001, 28/11/2003, 20/9/2010, 25/8/2011, 29/12/2012 and 26/2/2014. The electricity bills are addressed to M/s Nyanja Services.

20. He claims that he has lawfully occupied the Suit Property since January, 1986 and has been paying the utility bills and rates due to the

County Government of Nairobi. He met these responsibilities as the owner of the Suit Property.

21. On cross examination, the Plaintiff confirmed that he did not sign the agreement which was forwarded to his lawyer. He stated that he paid Kshs. 200,000/= in cash and then 500,000/= from the fixed deposit on 20/11/1985. He also stated that the completion date was superseded by the negotiations. He denied owing a balance of Kshs. 483,705/=. He occupied the property on 4/1/1986 when it had no tenants.

22. His lawyers were still holding the original documents including the conveyance which Mr. Rasool forwarded before he died. He filed suit when the vendor's administrators brought up issues of interest and rent and refused to sign the transfer documents. He maintains that the Defendant's computation in the counterclaim of the sums paid excluded a payment of 500,000/= which he paid to Mr. Rasool in cash.

23. He stated that the payments were made in trust based on the fact that he had a good relationship with Mr. Rasool. He relied on Mr. Rasool's advocate's letter of 11/12/1985 in which the balance payable was stated as being Kshs. 1.3 million. He also stated that he allowed Mr. Rasool to keep the interest he had earned on the fixed deposit. He entered into the premises after he had paid Kshs. 700,000/= and the further sum received from Nationwide Finance making the total Kshs. 1,216,000/=.

24. Judy Wanjiru Gichumbi also testified for the Plaintiff on behalf of her late father, Mr. David Gichumbi Njoroge, who represented the Plaintiff in the sale transaction. She confirmed that the documents produced by the Plaintiff in the supplementary list of documents were authored by her father and represent the position of the matter. It was her evidence that all the payments were made to the Defendant and that the Plaintiff was never a tenant of the Defendant but was given possession as a buyer. She conceded that there was no acknowledgement of the payment of Kshs. 500,000/= which the Plaintiff claimed he paid by cash to Mr. Rasool. Her evidence was based on her father's letters since she was not there when the transaction took place.

25. The Defendant called two witnesses one of whom was Mr. Mohammed Akram Khan, who acted for the late Ghulam Rasool in the sale of the Suit Property. He confirmed that he forwarded the sale agreement to the Plaintiff's advocate and that by the time of entering into contract, the Plaintiff had already paid the sum of Kshs. 200,000/=. The Plaintiff was to have paid Kshs. 300,000/= to him to hold as stakeholder while the balance of Kshs. 1.5 million was to be paid on the completion expressed to be on 31/10/1985. He confirmed that he forwarded the documents to the Plaintiff's advocate and that the Defendant informed him of an arrangement where the Plaintiff was to transfer the sum of Kshs. 500,000/= through Nationwide Finance Company Limited.

26. He clarified that the outstanding balance of Kshs. 1.3 million indicated in his letter of 11/12/1985 took into account the sum of Kshs. 500,000/= transferred from Nationwide Finance Limited. That letter pointed out that the Plaintiff was in breach of the agreement to complete the sale and gave him 21 days' notice to complete the sale. He confirmed writing the letters produced by the Plaintiff and that the undated letter informed the Plaintiff that interest at 16% p.a. would be calculated on the balance of the amount from 1/11/1985 while rent would be charged at Kshs. 15000 per month from 1/1/1986.

27. By his letter of 12/2/1986 M. Khan demanded rent from the Plaintiff for January and February 1986. He informed the Plaintiff's advocate vide his letter of 22/2/1986 that the agreement to sell the property was cancelled and rescinded and the deposits paid by the Plaintiff forfeited. The letter demanded rent of 30,000/= and sought the return of documents of the title earlier forwarded to the Plaintiff's advocate. His letter of 3/3/1986 addressed to the Plaintiff's advocate demanded the return of the documents of title. Mr. Khan concluded that the Plaintiff paid the total sum of Kshs. 1,516,295/= albeit well outside the stipulated outlines leaving a balance of Kshs. 483,705/.

28. The Defendant also called Moses Mureithii Njuguna, a registered and practicing valuer, to give evidence. He was engaged by the Defendant's advocate to conduct a rent valuation of the Suit Property with a view to ascertain and advice on its historical market rent values for rental assessment purposes. The valuation covered the period from 1990 to 2011 and was based on the acreage of the land and did not take into account the structures on the Suit property. The comparable he adopted used properties of similar user that is, residential within the same neighborhood during the same period.

29. This dispute mainly revolves around the sum of Kshs. 500,000/= and whether or not the Plaintiff paid this sum to the late Ghulam Rasool. The other issues for determination are, did the Defendant rescind the sale? Is rent payable to the Defendant as counterclaimed or is the Plaintiff entitled to the orders he seeks in the Plaintiff?

30. The other contested issue is whether Lady Justice Nyamweya made a final finding on the issue of payment of the full purchase price. That decision related to an application at the interlocutory stage. The court will not take it into consideration but will instead analyse the evidence adduced at the trial.

31. Parties relied on the terms of the sale agreement even though it was not signed. Indeed, even the payment of Kshs. 200,000/= mentioned in the sale agreement is not disputed by the Defendant.

32. The Plaintiff claims he paid the sum of Kshs. 500,000/= to Mr. Ghulam Rasool in 1985 in cash. He relies on the Defendant's advocate's letter of 11/12/1985 which stated that the balance was Kshs. 1.3 million. According to him, this took into consideration the sum of Kshs. 200,000.00 acknowledged in the sale agreement which paid in cash to Mr. Rasool and cash of Kshs. 500,000.00 which he paid to Mr. Rasool directly. The Plaintiff maintains that he overpaid the purchase price by Kshs. 16,295.00 being the interest earned from the fixed deposit. The Plaintiff also relies on the ruling of Lady Justice Nyamweya of 4/2/2015.

33. The Defendant submits that having failed to clear the purchase price, the Plaintiff cannot be said to be the beneficial owner of the Suit Property. He relies on the decision in **Gurdev Singh Birdi and Narinder Singh & Another v. Abubakar Madhubuti** [1997] eKLR in support of the argument that a party who seeks the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he has undertaken to perform.

34. The court also stated that time will not be considered to be of essence unless the parties expressly stipulate that the condition as to time must be strictly complied with, or the surrounding circumstances show that time should be considered of essence or if a party who has been subjected to unreasonable delay gives notice to the party in default making time of essence. There is no evidence in the instant case that time was made of essence for the contract.

35. For a party to make time of essence in contracts for the sale of land when time has not been made the essence, he has to serve a notice on the party after the unreasonable delay making time of essence before the party can avoid the contract. In the *Gurdev case*, Tonui JA found that the fact that there was no evidence that the appellants had tendered the balance of the purchase price confirmed that they were never ready, able or willing to carry out their part of the agreement.

36. The Judge also found that it would be inequitable to grant the relief of specific performance since it would be oppressive, unjust and financially injurious to require the respondent who had not been guilty of laches nor inordinate delay to part with his property more than four years after the event when its value had materially appreciated. In this court's view, the same position would apply to the Plaintiff's case. The Plaintiff entered into the sale agreement with the late Ghulam Rasool in 1985. He was given possession of the Suit Property by the late Ghulam Rasool in January 1986. The late Rasool forwarded the documents of title to the Plaintiff after he made substantial payments of the purchase price.

37. Time may cease to be of essence where a party waives the benefit of such a provision in the contract by words or conduct. Waiver may occur where negotiations for completion of the contract occur after the time of completion.

38. The right to terminate a contract for sale of land would arise where there is breach of an essential term of the contract or where the contract is repudiated. If time has ceased to be of the essence and a party is guilty of unreasonable delay in performance, the innocent party may serve a notice to complete on the defaulting requiring performance within a reasonable time. The innocent party would be entitled to rescind if the time stipulation is not complied with.

39. Mr. Khan's letter dated 11/12/1985 gave the Plaintiff 21 days to complete the sale. His letter of 22/2/1986 that the agreement to sell the property was cancelled and rescinded and the deposits paid by the Plaintiff forfeited. The Defendant engaged in further negotiations and accepted payments from the Plaintiff after the dates indicated for completion in Mr. Khan's letters.

40. The court is inclined to agree with the Plaintiff that by the time he made the payment of Kshs. 516,295.00 from Nationwide Finance Company to Mr. Rasool on 8/1/1986 the Plaintiff had already paid Kshs. 700,000.00 to Mr. Rasool. This is corroborated by Mr. Khan's letter of 11/12/1985 which stated that the outstanding balance was Kshs. 1.3 Million yet by then the payment from Nationwide Finance Company had not been received. The parties had a good relationship and trusted each other that is why Mr. Rasool allowed the Plaintiff to take possession of the Suit Property before he paid the purchase price in full. He did not insist on the sale agreement being signed although the parties relied on it. Mr. Rasool asked Mr. Khan to forward the documents to the Plaintiff before completion of the sale.

41. The court finds that the Plaintiff has proved his case on a balance of probabilities and grants prayers (a) and (b) of the Amended Plaint. The court finds that the Defendant has failed to prove his Amended Counterclaim; it is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 31st May 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kingara for the Plaintiff

Ms. Asli for the Defendant

Mr. V. Owuor- Court Assistant